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No. 98-835

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ET AL., PETITIONERS

v.

RAUL PERCIRA GONCALVES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. *Jurisdiction.* Respondent argues (Br. in Opp. 13-15) that there is no conflict among the circuits on the jurisdictional decision of the court below—namely, that the district courts have jurisdiction under the general federal habeas corpus statute, 28 U.S.C. 2241, to review a criminal alien's claim that the Attorney General erroneously determined that Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, applies in pending deportation cases to bar discretionary relief from deportation under 8 U.S.C. 1182(c) (1994) to certain classes of criminal aliens. Recently, however, two courts of appeals have disagreed with the First Circuit's jurisdictional ruling in this case, and have held that Congress precluded access to the district courts in immigration cases under Section 2241.

In *LaGuerre* v. *Reno*, No. 98-1954 (Dec. 22, 1998), which as respondent notes (Br. in Opp. 14 n.19) involves the same jurisdictional and merits issues as those presented here, the Seventh Circuit squarely rejected the First Circuit's decision in this case. The Seventh Circuit held that a district court could not exercise jurisdiction under Section 2241 over either the non-constitutional claim or the constitutional claim that respondent has sought to raise in this case. See *LaGuerre*, slip op. 7 ("We conclude that for the class of aliens encompassed by [AEDPA] section 440(d), judicial review by means of habeas corpus did not survive the enactment of that section."). The Seventh Circuit noted that the purpose of Congress's 1996 amendments to the immigration laws limiting jurisdiction over criminal aliens' challenges to their deportation orders "was to curtail and speed up judicial review of deportation orders against disfavored classes of criminals, such as drug offenders." *Id.* at 6. But "[i]f the effect of the new provision was, as [respondent here and the *Goncalves* court] believe, to shift judicial review to the district court, followed of course by appeal to this court, then Congress *enlarged* judicial review for these deportees (and for no others![])." *Ibid.* (emphasis added); see *id.* at 7 (noting that, if the *Goncalves* court is right, then "Congress accomplished nothing toward its aim of curtailing judicial review," and "[m]aybe less than nothing, if by closing the door to review by the courts of appeals Congress simultaneously opened the door to review by the district courts *followed by* review by the courts of appeals").[1]

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[1] See also *Henderson* v. *INS*, 157 F.3d 106, 119 n.9 (2d Cir. 1998) (considering itself bound by prior circuit decision to find that district court had jurisdiction, but acknowledging that "review in the courts of appeals seems more consistent with congressional intent"), petition for cert. pending *sub nom. Reno* v. *Navas*, No. 98-996 (filed Dec. 17, 1998).

Similarly, in *Richardson* v. *Reno*, No. 98-4230, 1998 WL 889376 (Dec. 22, 1998), the Eleventh Circuit concluded that Congress "strip[ped] all jurisdiction, including § 2241 habeas, from the district courts." *Id.* at *4. The Eleventh Circuit emphasized (*id.* at *13) that 8 U.S.C. 1252(g) (Supp. II 1996) provides that, notwithstanding "any other provision of law, no court shall have jurisdiction" to review the decision of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders under the Immigration and Nationality Act (INA). As the Eleventh Circuit explained, Section 1252(g)'s "broad admonition that it applies 'notwithstanding any other provision of law' sufficiently and clearly encompasses other provisions of law, such as § 2241. When Congress says 'any,' it means 'any' law, which necessarily includes § 2241." *Richardson*, 1998 WL 889376, at *13.[2]

Respondent suggests (Br. in Opp. 15-16) that this case is of limited importance because it concerns only the transitional jurisdictional rules in Section 440(a) of AEDPA, 110 Stat. 1276, and Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

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[2] Respondent argues (Br. in Opp. 15 n.21) that *Richardson* does not conflict with the decision below because it did not involve judicial review of a final order of deportation. The ruling in *Richardson*, however, was *broader* in scope than the context of review of final deportation orders, and necessarily encompassed the conclusion that the district courts lack jurisdiction under Section 2241 to entertain challenges to final orders of deportation. See *Richardson*, 1998 WL 889376, at *13 ("Accordingly, we conclude that [Section 1252(g)] repeals any statutory jurisdiction over immigration decisions other than that conferred by [Section 1252]. That repeal includes § 2241 habeas jurisdiction over immigration decisions by the Attorney General under the INA."). Indeed, the Eleventh Circuit further addressed and rejected Richardson's contention that, if Section 1252(g) precludes district court habeas jurisdiction over immigration decisions under Section 2241, then it violates the Constitution because he would have no opportunity for judicial review of his final order of deportation. See *id.* at *28-*29.

(IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-626. That is incorrect. A central aspect of the First Circuit's decision was its rejection (Pet. App. 26a-28a) of the government's argument that Section 1252(g)—which applies also to IIRIRA's permanent review provisions—precluded the district court from exercising habeas jurisdiction under Section 2241.[3] Thus, district courts in the First Circuit, bound by that decision, are likely to conclude in the future that, notwithstanding Section 1252(g), they may exercise habeas jurisdiction under Section 2241 at the behest of criminal aliens who are barred by IIRIRA's permanent preclusion of review provision, 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996), from raising certain claims by petition for review directly in the court of appeals. Indeed, respondent has pointed to no difference between that permanent provision and the preclusion-of-review provisions in Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA that would suggest any difference in outcome. As a result, the bifurcated review scheme adopted by the court of appeals, which perversely gives *greater* opportunities for judicial review of deportation orders to the very criminal aliens whose removal Congress wished to expedite, is likely to persist. See also Pet. 24 n.15.[4]

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[3] Indeed, respondent defends (Br. in Opp. 18) this aspect of the court of appeals' decision as a correct application of the presumption against repeal of habeas corpus articulated in *Felker* v. *Turpin*, 518 U.S. 651 (1996), and as avoiding serious constitutional questions about Section 1252(g). As the Eleventh Circuit observed in *Richardson*, however, *Felker* does not support the First Circuit's construction of Section 1252(g) in the decision below, because the withdrawal of jurisdiction in Section 1252(g) is much broader than it was in the statute examined in *Felker*. "Unlike *Felker*, the language of [Section 1252(g)] does not require repeal by implication. Indeed, Congress could hardly have chosen broader language to convey its intent to repeal any and all jurisdiction except that provided by [the INA itself.]" *Richardson*, 1998 WL 889376, at *14.

[4] Respondent contends (Br. in Opp. 6) that the position advanced in our petition, that a criminal alien covered by the jurisdiction-limiting and

Respondent also notes (Br. in Opp. 18-20) that this Court has considered, on habeas corpus proceedings, aliens' claims that they were eligible to be considered for discretionary relief from deportation. In neither *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), nor *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957), did the Court's opinion address the question of habeas corpus jurisdiction, however, and certainly in neither case did the Court suggest that habeas corpus jurisdiction was required by the Constitution itself. This Court has never considered itself bound by *sub silentio* jurisdictional holdings in the manner respondent suggests. See *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 97 (1994). And although respondent maintains (Br. in Opp. 20) that judicial review of his *non-constitutional* claim is required by Article III as well as the Suspension of Habeas Corpus Clause, U.S. Const., Art. I, § 9, Cl. 2, this Court has recognized that the federal courts have jurisdiction under Article III to review statutory questions only to the extent that Congress assigns

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preclusion-of-review provisions of AEDPA and IIRIRA may nonetheless raise constitutional challenges to provisions of the INA affecting his deportation order on a petition for review in the court of appeals, is inconsistent with the government's position in *Kolster* v. *INS*, 101 F.3d 785 (1st Cir. 1996), and *Chow* v. *INS*, 113 F.3d 659 (7th Cir. 1997), where the government moved for dismissal of the petitions for review. *Kolster*, however, involved a claim that the Attorney General had incorrectly construed another aspect of Section 1182(c)'s requirements for eligibility for discretionary relief from deportation, see 101 F.3d at 787; we argued there, as we have argued here (Pet. 21) that Congress permissibly withdrew the federal courts' jurisdiction to consider such *non-constitutional* claims involving eligibility for discretionary relief from deportation. *Chow* also involved only non-constitutional challenges to the alien's deportation order. See 113 F.3d at 662. After AEDPA was enacted, Chow argued that its withdrawal of review in the court of appeals was itself unconstitutional, see *id.* at 668, but that is not a "constitutional claim[]" raised against the deportation order itself (see Br. in Opp. 6).

it to them, see *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984), and also that "[t]he power to expel aliens, being essentially a power of the political branches of government, * * * may be exercised entirely through executive officers, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit," *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952) (internal quotation marks omitted); see *ibid.* ("No judicial review [of deportation orders] is guaranteed by the Constitution.").[5]

2. *Merits.* Respondent argues (Br. in Opp. 21-22) that there is no conflict in the circuits on the merits of the Attorney General's decision in *In re Soriano* (Pet. App. 125a-138a) that Section 440(d) of AEDPA applies to all applications for relief from deportation pending at the time of AEDPA's enactment. In *LaGuerre*, however, the Seventh Circuit ruled (slip op. 9-10), contrary to the court below, that the Attorney General's decision in *Soriano* is correct.[6] The

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[5] Respondent relies (Br. in Opp. 20) on *CFTC* v. *Schor*, 478 U.S. 833 (1986), for the proposition that the federal courts must have authority to review his non-constitutional claim. That case, however, involved a federal agency's authority to adjudicate a state-law claim, not limitations on a federal court's jurisdiction to review a federal agency's determination of a federal statutory issue. See *id.* at 850-852. Moreover, the Court has noted that immigration cases involve "public rights" that may be assigned to administrative agencies for adjudication. See *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932).

[6] Although the Seventh Circuit concluded that the district court had no jurisdiction over the aliens' habeas corpus petitions under Section 2241 (see p. 2, *supra*), it noted the possibility that the aliens might be able to raise their claims by petitions for review in the courts of appeals, see *LaGuerre*, *supra*, slip op. 8-9, 10-11, and it addressed the merits of their contentions "lest [the aliens] feel that [the court has] tripped them up on a technicality" (namely, having filed "in the wrong court under the wrong statute"), *id.* at 9. Even if the court of appeals' discussion of the merits of the aliens' claims was technically dictum, it will almost surely be followed by subsequent panels of that court. Compare *Henderson*, 157 F.3d at 119

Seventh Circuit concluded that the application of Section 440(d) to pending cases does not implicate the presumption against retroactivity because "[i]t would border on the absurd to argue that these aliens might have decided not to commit drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation." *LaGuerre*, slip op. 10. Given the conflict of authority on a matter affecting thousands of aliens already in deportation proceedings or pursuing federal-court litigation (see Pet. 23), review of the lower court's decision on the merits is warranted.

Respondent also argues (Br. in Opp. 22-23) that the decision below did not articulate or rely on a presumption against retroactivity. That contention, however, cannot withstand scrutiny. The First Circuit squarely held (Pet. App. 43a) that "[t]he Attorney General's application of the new AEDPA restrictions takes away a form of relief that, while discretionary, is plainly substantive, and so implicates [the] presumption against retroactivity" articulated in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). Under the decision below, therefore, congressional enactments restricting the circumstances under which aliens may be granted discretionary relief from deportation, or expanding the circumstances under which they may be deported, are considered "substantive" and are therefore subject to the presumption against retroactivity. That application of the presumption against retroactivity to deportation cases has far-reaching implications for the Attorney General's ongoing administration of the Nation's immigration laws, conflicts

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(following conclusion in *Jean-Baptiste* v. *Reno*, 144 F.3d 212, 229-220 (2d Cir. 1998), which was arguably dictum, that Section 2241 jurisdiction remains available in district courts for criminal aliens).

with the Seventh Circuit's decision in *LaGuerre*, and warrants review.[7]

Unlike the court of appeals, respondent acknowledges (Br. in Opp. 25) that Congress expressly directed that other provisions of AEDPA be applied prospectively only, but he nevertheless argues that a court should not infer from that fact that Congress intended that Section 440(d) be applied to pending cases. He argues that the "most relevant comparative provisions" to Section 440(d) supposedly are others in AEDPA that Congress expressly directed be applied to pending cases. But if one is examining Congress's intent as to the temporal scope of Section 440(d), the most relevant comparison would not be (as respondent argues) to provisions in different subtitles of AEDPA (see AEDPA § 413, 110 Stat. 1269, and § 421, 110 Stat. 1270) but rather to an effective-date provision in the *same* section of AEDPA,

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[7] Respondent observes (Br. in Opp. 24 n.30) that *Landgraf* relied on *Chew Heong* v. *United States*, 112 U.S. 536 (1884), to support the presumption against retroactivity. See *Landgraf*, 511 U.S. at 271-272. *Chew Heong*, however, turned crucially on the fact that, under a preexisting treaty between the United States and China, certain Chinese nationals then in the United States had what the Court described as "the right to go from and return to the United States at pleasure, without being subjected to regulations or conditions affecting that right." 112 U.S. at 539; see *id.* at 543. Because the treaty had secured such a right, the Court concluded that a subsequent Act of Congress, requiring a certificate for a Chinese national to reenter the United States, should not be applied to a Chinese national who had left the United States before the Act was passed and thereafter sought to reenter, because to apply it in that manner would retroactively impair the "rights previously vested" in him. See *id.* at 559. By contrast, the application of Section 440(d) of AEDPA to pending deportation proceedings does not affect any "rights previously vested," because no alien has a right to discretionary relief from deportation. See *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996); *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956). The Attorney General's construction of Section 440(d) in *Soriano*, therefore, is not "retroactive" at all.

Section 440(f). See 110 Stat. 1278. Since Congress, in Section 440(f), made *only* the amendments in Section 440(e) applicable to cases in the future, it is equally, if not more, reasonable to infer that Congress intended the rest of Section 440, including Section 440(d), to apply to all pending cases.

Finally, respondent argues (Br. in Opp. 26-27) that the merits of the Attorney General's decision in *Soriano* have not been sufficiently examined in the courts of appeals because the First and Second Circuits have considered only the first step of the *Landgraf* analysis, and have not also applied the second step, involving the presumption against retroactivity. As just explained, however, the court below *did* apply the presumption against retroactivity. See Pet. App. 41a-44a. The Seventh Circuit, moreover, has now issued a directly contrary ruling. See pp. 6-7, *supra*. The application of *Landgraf* principles to Section 440(d) has been thoroughly aired in the courts of appeals and in dozens of district court decisions and is fully ripe for this Court's consideration.[8]

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[8] Respondent also notes (Br. in Opp. 27) that he has raised a constitutional equal-protection challenge to Section 1182(c), and that the court of appeals' decision made it unnecessary for that constitutional claim to be resolved. It is true that, if the Court were to agree with respondent that the district court had habeas corpus jurisdiction in his case but were to agree with the government that Section 440(d) is applicable to his case, then the courts would have to consider respondent's constitutional claim on remand. It is unlikely, however, that the courts of appeals will be able to avoid the constitutional issue raised by respondent. The same claim has been raised by many aliens whose deportation proceedings were commenced after AEDPA's date of enactment, and the Seventh Circuit has already concluded that the claim has no merit. See *LaGuerre*, slip op. 11. Further, if the Court grants certiorari in *INS* v. *Magana-Pizano*, No. 98-836, as respondent has agreed it should do if it grants review in this case (see Br. in Opp. 27-28), and if the Court concludes in that case (as we have argued, 98-836 Pet. 18-19) that the Ninth Circuit had jurisdiction over the

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For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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alien's constitutional claim raised in the petition for review (the same claim as the one raised in this case), then the Ninth Circuit will in any event have to address that claim on remand from this Court.